United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

74-1489

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

VIRACHAI SANGUANDIKUL,

Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION RENDERED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Appellant's Appendix

THEODORE KRIEGER
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DOCKET ENTRIES

D. C. Form No. 100

CRIMINAL DOCKET

JUDGE DUFFY

JUDGE DUFFY

73 CRIM. 794

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.: 264-6445
vs.	Eugene Bannigan
KAN LANG NG	
VIRACHAI SANGUANDIKUL	
	For Defendant:
	V. Sanguandikul -Alvin Geller Esq.
	299 B'Way NYC 233-3330

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,					
Clerk,					
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses, Ti.21:812,841(a)(1) & 841(b)(1)(A)					
Dist.& Possess with intent to					
dist. schedule I (Heroin Ct. 2)					
Conspiracy to to do(Ti.21:846)					
Ct. 1) TWO COUNTS					

DATE	PROCEEDINGS
7-10-73	Filed Indictment.
7-16-73	Adj. to Aug. 16,1973. Wyatt,J.
8-16-73	Deft Virachai Sanguandikul thru interpreter Venida Buiva, Court enters plea of not guilty. Deft remanded in lieu of $150,000 bail previously fixed by the Magistrate. Case assigned to Judge Duffy. Deft ord to the Magistrate to be assigned counsel. Wyatt,J.
8-20-73	KAN LANG NG - Pleading adjd to Aug 27-73...Wyatt,J.
8-27-73	KAN LANG NG - Pleads not guilty, 30 days for motions. Deft released on bail of $25,000 P.R.B. previously fixed by Magistrate....Wyatt, J.

— See over —

73 Cr. 794 JUDGE [illegible] Duffy, J. JUDGE DUFFY

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
9-5-73	V. SANGUANDIKUL - Deft and atty.present. Application for bail reduction is denied. Deft is remanded in lieu of $150,000 bail previously fixed by Magistrate.....Duffy, J.		
9-7-73	V.Sanguandikul - Filed notice of appearance.		
9-10-73	V.SANGUANDIKUL - Filed afdvt. & notice of motion for a bill of particulars, for discovery & inspection....		
10-3-73	V.SANGUANDIKUL - Application by defts atty. for reduction of bail. Govt. opposes motion -application denied - Duffy,J.		
	KAN LANG NG - Bench warrant ordered.		
10-11-73	V.SANGUANDIKUL - Legal aid conditionally assigned. Atty.Irving Cohen and firm of Rubin,Gold & Geller relieved as counsel. Case adjd to 10-16-73 at 4p.m....Duffy, J.		
10-16-73	V.SANGUANDIKUL - (Atty.& interpreter present, Counsel to be assigned..Deft Remanded. Duffy, J.		
10-25-73	V.SANGUANDIKUL - Filed statement of B.J.Golub esq. & notice of motion for an order to inspect Grand Jury minutes, granting a bill of particulars, to suppress evidence and for severance.....		
10-29-73	V.SANGUANDECLKUL - Filed CJA Authorization of Somporn Bharksuwan, interpreter.		
10-30-73	V.SANGUANDECLKUL - Filed letter from deft dated 5-10-73		
11-2-73	V.SANGUANDECLKUL - Filed memo endorsed on motion filed 9-10-73..This motion is superseded by another motion for the same relief which has been filed by the deft's present atty....So Ordered....Duffy,J.		
11-2-73	V.SANGUANDIKUL - Filed memo endorsed on motion filed 10-25-73..This motion is denied except in so far as consented by the U.S.Atty....Duffy, J. m/n		
11-2-73	V. SANGUANDIKUL-Filed Affidavit of E.F. HANNIGAN, A.U.S. dated 11-1-73.		
11-5-73	V.SANGUANDIKUL - Filed Govt's notice of readiness for trial.		

-CONT'D ON P.3-

JUDGE DUFFY POLLACK, J. JUDGE [illegible]

DATE	PROCEEDINGS
11-12-73	V.SANGUANDIKUL - Filed motion for release on personal recognizance bail
11-19-73	V.SANGUANDIKUL - Filed bill of particulars.
11-30-73	Case reassigned to Judge Pollack. Mailed notices to attys.
1-4-74	V.SANGUANDIKUL - Filed affdvt. & notice of motion to dismiss the indictment.
1-4-74	V.SANGUANDIKUL - Filed affdvt. of Daniel H.Murphy,II in opposition to motion to dismiss.
1-28-74	V.SANGUANDIKUL - (Atty. Present & Interpreter Swarn) Deft. motion to suppress certain statements argued, Dec.Res. BAUMAN,J.
1-29-74	V. SANGUANDIKUL - Defts. motion of 1-28-74 is denied. (Atty.present & Interpreter present) Jury trial begun before BAUMAN,J.
1-30-74	Trial Cont'd.
1-31-74	Trial Cont'd.
2-1-74	Trial Cont'd and concluded. Jury verdict, deft. guilty as charged. P.S.I. Ordered. Deft. remanded, No bail. Sentence set for 3-17-74 at 9:30 a.m. BAUMAN,J.
2-14-74	V. SANGUANDIKUL - Filed CJA Form # 21 Authorization and voucher for interpreter.
2-19-74	V.SANGUANDIKUL - Filed Order. Upon letter of deft. dtd. Feb.4th-74, requesting appointment of new counsel, Benjamin Golub,relieved and William K.Madden is appointed. BAUMAN,J.
3-14-74	SANGUANDIKIUL - Filed CJA Form # 21, Authorization for transcript.
3-21-74	SANGUANDIKUL - Docketed remand dtd. 8-16-73. Filed marked 2-8-74.
3-28-74	SANGUANDIKUL - Filed notice of motion to set aside verdict.
3-28-74	SANGUANDIKUL - Filed defts. Memo of law.
4-4-74	SANGUANDIKUL - Filed CJA Form # 21; Authorization and vouchet for atty fees. BAUMAN,J.
4-10-74	Filed Govt memo in opposition to defts. post trial motion.
4-9-74	VIRACHAI SANGUANDIKUL - Deft. (Atty Present) Filed Judgment and commitment and issued copies. It Is Adjudged that the deft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of 10 yrs on each of cts. 1 & 2. Sentence imposed on each of cts. 1 & 2 are to run concurrently with each other. Pursuant to the provisions of Section 841, Title 21, U.S.C., Deft. is placed on Special Parole for a period of 3 yrs., to commence upon expiration of confinement. BAUMAN,J.
4-17-74	VIRACHAI SANGUANDIKUL- Filed notice of appeal from a judgment of conviction by a jury

cont. on page 4.

DATE	PROCEEDINGS
cont.	rendered Feb. 1-74, and from an order by Judge Bauman rendered on April 9-74. m/n
5-8-74	VIRACHAI SANGUANDIKUL - Filed notice that the record has been trans. to U.S.C.A.
5-1-74	SANGUANDIKUL - Filed remand dtd. 2-1-74.
5-1-74	SANGUANDIKUL - Filed copy of J/C with marshals return deft. delivered to F.D.H. 4-9-74.

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA, :

:

:

:

:

Defendants . :

- -X

The Grand Jury charges:

1. From on or about the 1st day of July, 1973, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York,

KAN LANG NG and
VIRACHAI SANGUANDIKUL,

the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about the 6th day of August, 1973, KAN LANG NG walked in the vicinity of Grand and Clinton Streets, New York, New York.

2. On or about the 6th day of August, 1973, KAN LANG NG made a phone call.

3. On or about the 6th day of August, 1973, VIRACHAI SANGUANDIKUL handed KAN LANG NG a brown paper bag.

(Title 21, United States Code, Section 846.)

SECOND COUNT

The Grand Jury further charges:

On or about the 6th day of August, 197[illegible], in the Southern District of New York,

LAO LANG NG and
VIRACHAI SANGUANCHUL,

the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 3 pounds of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

FOREMAN

PAUL J. CURRAN
United States Attorney

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CHARGE OF THE COURT

THE COURT: (Bauman, J.) Ladies and gentlemen of the jury, now that you have heard the evidence and the argument it becomes my duty to give you the instructions of the Court as to the law applicable to this case. It is your duty as jurors to follow the law as stated in these instructions of the Court and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law but must consider the instructions as a whole.

You have been chosen as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the not-guilty plea of the accused.

You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice or public opinion. Both the accused and the government expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

Neither are you to be concerned with the wisdom of

any rule or law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court. Just as it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

Justice through trial by jury must always depend on the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors and to arrive at a verdict by applying the same rules of law as given in the instructions of the Court.

It is the duty of the attorney on each side of the case to object when the other side offers testimony or other evidence which the attorney believes is not admissible. You should not show prejudice against the attorney or his client because the attorney has made objections. Upon allowing testimony or other evidence to be introduced over the objection of an attorney, the Court does not indicate any opinion as to the weight of such evidence. You, the jurors, are the sole judges of the credibility of all the witnesses and the weight of all the evidence.

When the Court has sustained an objection if a question was addressed to a witness, the jury must disregard the question entirely and may draw no inference from the wording of it or speculate as to what the witness would have said if he had been permitted to answer any question.

During the course of the trial I occasionally asked questions of a witness in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on matters to which my questions may be related. Remember at all times that you as jurors are at liberty to disregard all comments of the Court and arrive at your own finding as to the facts.

A defendant does not have to prove his innocence. On the contrary, he is presumed to be innocent of the accusations contained in the indictment. This presumption of innocence was in his favor at the start of the trial, is in his favor even as I instruct you at this time, and remains in his favor during the course of your deliberations in the juryroom.

A defendant although accused begins the trial with a clean slate, with no evidence against him. The law permits nothing but legal evidence presented before the jury to be considered in support of any charges against him. So the

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presumption of innocence alone is sufficient to acquit a defendant unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to the defendant, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

A reasonable doubt is such a doubt as would cause you to hesitate to act in the matters of importance in your own lives. It is a doubt which a reasonable person has after carefully weighing all the evidence. A reasonable doubt is one which appeals to your reason, your judgment, your common sense and your experience.

A reasonable doubt is not caprice, whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant. Vague, speculative or imaginary qualms or misgivings are not reasonable doubt.

It is not necessary for the government to prove the guilt of a defendant to a mathematical certainty or beyond all possible doubt. If that w re the rule few men

or women, however guilty they may be, would be convicted. The reason is that in this world of ours it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not suscpetible of mathematical certainty.

In consequence, the law is such that in a criminal case it is enough if proof that the defendant is guilty is established beyond a reasonable doubt and to a moral certainty, not beyond all possible doubt.

If after a fair and impartial consideration of all the evidence you are convinced of the guilt of the defendant beyond a reasonable doubt, you must convict him.

If, on the other hand, after such a fair, impartial and careful consideration of all the evidence, you entertain a reasonable doubt, you must acquit him.

Now, when I review the indictment with you, ladies and gentlemen, I remind you, as I told you at the outset, that the indictment is a charge, the way the government brings into court individuals it claims to have violated the law. But the indictment is not evidence of the guilt of the defendant nor does it detract in any degree from the presumption of innocence with which the law surrounds a defendant until you, the jury, are satisfied beyond a reasonable doubt of the guilt of the

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defendant as charged.

The sole function of the indictment is to define the charges against the defendant as to which the evidence at the trial must be addressed.

The defendant has pleaded not guilty and in so doing has put in issue every material allegation in the indictment and the government must prove each and every element of the crime charged beyond a reasonable doubt.

33 The indictment contains two counts or accusations. Count 1 is what we call the conspiracy count, and I shall now read it to you.

"The grand jury charges from on or about the 1st day of July, 1973 and continually thereafter up to and including the date of this indictment, in the Southern District of New York, Kan Lang Ng and Virachai Sanguandikul, the defendants, and others to the grand jury unknown, unlawfully, wilfully and intentionally combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b) of Title 18, United States Code.

"2. That it was part of said conspiracy that said defendants unlawfully and intentionally and knowingly would distribute and possess with intent to distribute Schedule 1 and 2 narcotic drug controlled

substances, the exact amount thereof to the grand jury unknown, in violation of Sections 812, 841(a)(1) and 841(b)(1)(a), Title 21, United States Code."

What are the essential elements of a conspiracy? In order to find a defendant guilty of conspiracy, you must find that the government has established the following essential elements beyond a reasonable doubt:

First, the existence of the conspiracy as charged in the indictment. That is, that some time between July 1, 1973 and August 10, 1973, which is the date of the indictment, a conspiracy existed to distribute heroin hydrochloride.

Second, that the defendant knowingly and wilfully became a member of the conspiracy; and,

Third, that at least one of the overt acts charged in the indictment was committed in furtherance of the conspiracy by at least one of the alleged conspirators.

If the government fails to establish any one of these elements beyond a reasonable doubt as to the defendant, you must find him not guilty. On the other hand, if the government has proven all of the elements beyond a reasonable doubt as to the defendant, you must find him guilty.

What is a conspiracy? A conspiracy is a

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combination, agreement or understanding of two or more persons designed to accomplish a criminal purpose by concerted action.. The gist of the crime of conspiracy is the unlawful combination or agreement to violate the law.

Conspiracy is often described as a partnership in a criminal purpose in which each member becomes the agent of every other member.

To establish a conspiracy the government is not required to show that two or more persons sat around a table and entered into a solemn pact orally or in writing, stating they formed a conspiracy to violate the law. Indeed, it would be extraordinary if there ever was such a formal document or specific oral agreement.

From its very nature conspiracy is almost always characterized by secrecy, rendering its detection difficult. Your common sense will tell you that when persons undertake to enter into a criminal conspiracy much is left to unexpressed understanding. Thus, express language or specific words are not required to indicate assent or attachment to a conspiracy.

It is sufficient if two or more persons in any manner, through any contrivance impliedly come to a common understanding to violate the law.

In determining whether or not the proof establishes

that the conspiracy charged in the indictment actually came into existence, you should consider all of the evidence which has been admitted with respect to the conduct, acts and declarations of each alleged conspirator and you may make such inferences as may be reasonably drawn therefrom.

The period of time charged in the indictment runs from on or about July 1, 1973 to August 10, 1973. It is not necessary for the government to prove that the conspiracy started and ended on those specific dates. It is sufficient if you find that, in fact, a conspiracy was formed and existed for a substantial time within the period set forth in the indictment and that at least one of the overt acts was committed during that period.

In this connection, it is not necessary for you to find that the conspiracy was successful. A conspiracy is basically an agreement to violate the law and may exist even though its final objectives were never achieved.

You may find that the existence of the conspiracy has been established if from proof of all the relevant facts and circumstances you find beyond a reasonable doubt that at or about the time alleged, at least two of the alleged co-conspirators came to a common understanding or agreement to carry out the criminal act charged in the

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indictment.

If you are satisfied beyond a reasonable doubt that the conspiracy charged existed, you must ask yourselves who participated in it. In determining whether the defendant was a member of the conspiracy, you should consider whether from the defendant's acts and declarations he knowingly and purposely entered the conspiracy.

In determining whether the defendant became a member of the conspiracy, you must determine not only what he participated in but whether he did so with knowledge of its unlawful purpose. That is, did he join with an awareness of at least some of the basic aims and purposes of the conspiracy?

It is important for you to understand that mere association with alleged co-conspirators does not establish a defendant's participation in the conspiracy, even if you find one did exist. So, too, mere knowledge by a defendant of the conspiracy or any illegal act on the part of an alleged co-conspirator, is not sufficient to establish membership in the conspiracy.

To find a defendant guilty of conspiracy, you must find that he knowingly and wilfully joined the conspiracy, with a specific intent and purpose of furthering its objectives. Did he intend to join that conspiracy? Did he

have a stake in its outcome and make it his own. How do you determine this?

An act is done knowingly and wilfully if it is done voluntarily and purposely and not because of mistake, accident, mere negligence or other innocent reason.

An act is done wilfully and unlawfully if it is done with an evil motive or purpose.

Knowledge and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision as to these questions is for you to take into consideration all the facts and circumstances shown by the evidence of the defendant's own acts and declarations, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question.

Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances. As far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable or ordinary consequences of his acts. The guilt of a conspirator is not governed by the extent or duration of his participation or whether he had knowledge of all of its operations. Thus, if you are satisfied

beyond a reasonable doubt that a conspiracy charge existed and that the defendant knowingly participated in it, the extent or duration of his participation has no bearing on his guilt or innocence.

Even if he participated in it to a degree more limited than that of his co-conspirators, he is equally culpable since he was in fact a conspirator.

Before we come to the last element which must be proven in a conspiracy charge, which is the element of overt acts, there is another principle of law which you should bear in mind. I have already told you that people enter into a conspiracy to accomplish an unlawful purpose and they become the agents for each other in carrying out the conspiracy.

Hence, the acts or declarations of one in the course of a conspiracy and in furtherance of it are deemed to be the acts of all of them and all of them are responsible for such acts.

Accordingly, if you find in accordance with these instructions that the alleged conspiracy existed and that two or more people participated in it, then acts done and statements and declarations made in furtherance of the conspiracy by any person found by you to have been a member of the conspiracy, may be considered against any

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defendant found to be a member, even though such acts or declarations were made in the absence and without the knowledge of that defendant.

It is important to note this principle applies only to the acts and declarations done or made during the continuance of the conspiracy and in furtherance of the conspiracy, that is, to carry out an unlawful objective or purpose of the conspiracy.

Thus, if you find that a conspiracy existed and that the defendant participated in it, then you may consider the acts and statements of his co-conspirator to carry out the conspiracy as evidence against him, even thought he may not have been present.

If you find beyond a reasonable doubt that there was a conspiracy and that the defendant was a member of the conspiracy, you must consider whether or not one of the alleged conspirators committed one of the overt acts charged in the indictment in furtherance of the conspiracy.

The overt acts charged in the indictment are as follows:

"1. In pursuance of said conspiracy and to effect the objects thereof the following overt acts were committed in the Southern District of New York.

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"1. On or about the 6th day of August, 1973, Kan Lang Ng walked in the vicinity of Grand and Clinton streets, New York, New York.

"2. On or about the 6th day of August, 1973, Kan Lang Ng made a phone call.

"3. On or about the 6th day of August, 1973, Virachai Sanguandikul handed Kan Lang Ng a brown paper bag."

The offense of conspiracy is completed when the unlawful agreement is made and any overt act is done by a conspirator to effect the objects of the conspiracy. An overt act is merely something that is done to further the objects of the conspiracy.

It need not be a criminal act in itself, or an act which of itself constituted or was an objective of the conspiracy. It may be an act which is innocent on its face but it must be of such character to further or promote or aid or assist in accomplishing the purposes of the conspiracy.

It is not necessary for the government to prove each member of the conspiracy committed or participated in a particular overt act since the act of any one done in furtherance of a conspiracy becomes the act of all the members.

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Also, the government is not required to prove each of the overt acts set forth in the indictment. It is enough if it proves the commission of at least one of the acts at or about the time alleged. It need not have occurred at the precise time or the precise place alleged in the indictment.

It is sufficient if you find that in fact a conspiracy was formed and existed for some substantial period of time within the period set forth in the indictment and that an overt act was committed during that period. That is, the period during which you find the conspiracy was in existence.

To sum up, in order to prevail against a defendant under the conspiracy count, the government must establish beyond a reasonable doubt the existence of an unlawful agreement, that the defendant knowingly and wilfully associated himself with the conspiracy and that an overt act in furtherance of the conspiracy was committed.

The second count charges the defendant with what is known as a substantive narcotic violation, and I shall now read that to you.

"The grand jury further charges that on or about the 6th day of August, 1973 in the Southern District of New York, Virachai Sanguandikul, the defendant,

unlawfully, wilfully and knowingly did distribute and possess with intent to distribute, a schedule 1 narcotic controlled substance, to wit, approximately three pounds of heroin hydrochloride."

In order to find the defendant guilty as charged in that count, the government must establish beyond a reasonable doubt the following essential elements:

First, that on or about August 6, 1973, the defendant possessed with intent to distribute or actually distributed a narcotic drug controlled substance.

Second, that he did so unlawfully, wilfully and knowingly. This means that you must be satisfied that he knew what he wss doing and did so deliberately. That is, he did so deliberately and purposely as opposed to mistakenly or inadvertently.

It is not necessary to find that he knew about the statute we have been talking about here, but rather that he knew what he was doing.

Third, that the alleged substance involved is in fact heroin hydrochloride.

The first element which you must find beyond a reasonable doubt in order to convict the defendant of the crime charged in count 2 of the indictment is that he distributed or possessed with intent to distribute a

narcotic drug controlled substance. In a few moments I will instruct you as to a narcotic drug controlled substance.

Now, I would like to focus on the terms distribute and possess with intent to distribute as they are used in this statute.

At the outset you will note these terms are used in the alternative. Therefore, you may find the first element is established if you are satisfied beyond a reasonable doubt either that the defendant distributed the narcotic drug controlled substance, or possessed it with the intent to do so. You need not find that he did both in order to convict.

A word about the term "possess." The law recognizes two kinds of possession, actual possession and constructive possession.

A person who knowingly has direct, physical control over a thing at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has the power at a given time to exercise dominion and control over the thing, is known to be in constructive possession of it. The law specifies also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing,

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possession is sole.

If you find from the evidence beyond a reasonable doubt that a defendant either alone or jointly with another had actual or constructive possession of the drug described in the indictment, then you may find that such drug was in the possession of the defendant within the meaning of the word "possess" as used in these instructions.

Possession may be proven by direct evidence, by circumstantial evidence, or by a combination of both.

The word "intent" refers to a person's state of mind. The word "distribute" means the actual, constructive or attempted transfer of the drug. So the term "possess with intent to distribute" can be fairly stated to mean to control an item, with the state of mind or purpose to transfer that item.

As to the third element, you must be satisfied beyond a reasonable doubt that the substance which was possessed or distributed was heroin hydrochloride, a schedule 1 narcotic drug controlled substance. In fact, counsel for the government and counsel for the defendant are agreed that Government's Exhibits 1, 2 and 3 have been analyzed by a chemist and that the substance involved is heroin hydrochloride. There is no evidence that the

the substance is anything other than heroin hydrochloride but still you must find beyond a reasonable doubt that the substance is heroin hydrochloride before the third element is satisfied.

In considering the evidence which you have heard, have in mind the law recognizes two types of evidence. One is direct evidence such as the testimony of an eye witness and the other is circumstantial evidence.

Circumstantial evidence consists of circumstances from which the jury may infer by a process of reasoning certain facts which are sought to be established as true. Of course, the classic example of circumstantial evidence is when somebody in your family goes into the apartment carrying a wet umbrella and wearing a wet raincoat, you know that it is raining. You don't have to look outside because you can tell from everything that you have seen, these wet objects, that it is raining.

Both direct and circumstantial evidence are good evidence and no greater degree of certainty is required when circumstantial evidence is admitted than when direct evidence is admitted. As a general rule, the law makes no distinction between direct and circumstantial evidence. It simply requires that before convicting a defendant the jury be satisfied of his guilt beyond a reasonable doubt

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from all the evidence in the case.

The government asks you to draw one set of inferences while the defendant is asking you to draw another. It is for you alone to decide what inference you will draw from the evidence and what facts you find to have been proven.

An inference is a conclusion which reason and common sense leads the jury to draw from the facts which have been proven but in this connection you must remember if two sets of inferences may reasonably be drawn from the evidence, one consistent with innocence and the other with guilt, then you must not convict. As I have explained, the government must prove each and every element beyond a reasonable doubt.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is really worthy of belief. Consider each witness' intelligence, motive and state of mind and demeanor and manner while on the stand as well as his background.

In evaluating the testimony of any witness, you

may take into consideration any bias or favoritism on the part of the witness. Consider also whatever attachment a witness may feel for one's side. Consider the witness' ability to observe the matters as to which he has testified and whether he impresses you as having an accurate recollection of these matters.

If you believe any witness has been impeached or discredited, it is your exclusive province to give the testimony of that witness the credibility, if any, that you think it deserves.

You have heard two government agents testify here. Government agents have an interest in prosecuting people who they think have violated the law, and that is an interest which you may consider.

If you think a witness testified falsely to you, you may reject all of his testimony or you may accept part of it if you find it reliable and reject the rest.

Consider also any relationship each witness may have to either side of the case, the manner in which he may be affected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Finally, as I have said, consider whether the witness has an interest in the case. Where a witness has an

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interest, he may have a temptation to color his testimony or even to withhold facts. This doesn't mean that a witness will color testimony and falsify it because he has an interest. It is merely a factor to be considered by you. Of course, the greater a person's interest the stronger the temptation may be to color or even falsify testimony. It is for you to say whether a witness at this trial was truthful in whole or in part in the light of his demeanor and all the evidence in the case.

The law permits a defendant at his own request to testify in his own behalf. The testimony of the defendant is before you. You must determine how far it is credible. The deep personal interest which every defendant has in the result of his case should be considered in determining the credibility of his testimony. You are instructed that interest creates a motive for false testimony. The greater the interest, the stronger is the temptation -- let me rephrase this. You are instructed that interest carries a motive for false testimony, that the greater the interest the stronger is the temptation and the interest of a defendant is a matter which may seriously affect the credence that should be given to his testimony.

I am not sending the exhibits which have been

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received in evidence with you as you retire for your deliberations. You are entitled to have and to see any or all of the exhibits as you consider your verdict. I suggest that you begin your deliberations and then if it would be helpful to you, you may ask for any or all exhibits simply by sending a note to me through one of the United States marshals.

If you find during your deliberations that you need to hear any of the testimony, you may also send me a note.

If you find anything I have said in these intructions requires clarification, again, send a note and an attempt will be made to give you what you need.

The punishment provided by law for the offense charged in this indictment is a matter exclusively within the province of the Court and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the defendant. Your function is now to weigh the evidence in the case and determine the guilt or innocence of the defendant. You must base your verdict solely on the basis of the evidence and these instructions as to the law.

The verdict must represent the considered judgment of each juror and in order to return a verdict it is

necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for himself but do so only after an impartial consideration of the evidence in the case with your fellow jurors.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. Remember at all times you are not partisans, you are judges, judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

If you are divided, do not report how the vote stands, and if you have reached a verdict, do not report what it is until you are asked in open court.

In conclusion, ladies and gentlemen, I am sure that if you listen to the views of your fellow jurors and if you apply your own common sense, you will reach a fair verdict here.

Remember that you are sworn to render your verdict without fear, without favor, without prejudice, and without sympathy.

Now, ladies and gentlemen, in just a moment I will permit you to retire in the company of the United States marshals. Your verdict will be in the following form. As to the defendant Virachai Sanguandikul, on count 1, guilty or not guilty. As to count 2, guilty or not guilty.

Will counsel step up to the sidebar?

The alternate juror is excused by the Court.

(At the sidebar.)

THE COURT: Any exceptions?

MR. MURPHY: I have none, your Honor.

MR.GOLUB: Your Honor, I would like to ask that the jury be charged that he cannot be convicted of a conspiracy unless he knew in fact that there was heroin in that.

THE COURT: I think that has been sufficiently covered in the charge and I decline to charge further.

MR.GOLUB: I would also like you to charge the jury that they can ask to listen to the tape if they so choose.

THE COURT: I think that was contained in the charge, that the exhibits are available to them and they

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know the tape is in evidence. I decline to specifically charge that.

MR. GOLUB: Also I request that you give all the requests contained in my requests submitted to the Court.

THE COURT: Yes, as to those requests they are denied except as they may have been included in the charge.

(In open court.)

THE COURT: Swear the marshals.

(The marshals were sworn by the clerk.)

THE COURT: Ladies and gentlemen of the jury, it is a nice day outside and rather than send out and have something brought in for you I will ask the marshal to take you to lunch now.

(The jury left for lunch at 12:25 p.m.)

THE COURT: Quite aside and apart, the jury having left the courtroom, and whatever the jury may ultimately do in this case, I would like to extend upon the record my commendation to the agents in this case for a job well done. Yours is a dangerous and difficult job and I would like to express the appreciation of at least one member of this Court for the work you have done in this case.

I shall expect you back at 2 p.m.

(Luncheon recess.)

(At 3:40 p.m. the following took place in the robing room.)

THE COURT: I have received this note from the jury:

"Questions we would like asked: Fingerprints? Plastic bag, brown paper bag apartment. Is the lawyer Legal Aid? What is the lawyer's status? Was Ng released on bail or on his guarantee? How much bail? Was bail set for the defendant? How much?"

I tell you right now, I don't propose to answer any of those questions and you have an exception, sir.

MR. GOLUB: Thank you, your Honor.

THE COURT: "Evidence wanted: Tape and written transcripts."

I will ask if they want the tape played and I will give the transcripts.

MR. GOLUB: I except to the ruling, your Honor.

THE COURT: "Transcript of Bannigan's interrogation with his notations."

Is that in evidence?

MR. MURPHY: It is not in evidence.

THE COURT: "Transcript of marks at college."

That is in evidence; they may have that.

"Court notes relating to how long has the defendant been unemployed."

Anything in the record about that?

MR. MURPHY: We have the answer at the time he was arrested, that is the only thing in the record on that.

THE COURT: Is that your recollection?

MR. GOLUB: I don't recall, your Honor.

THE COURT: I am sure you don't.

MR. MURPHY: Excuse me, Mr. Bannigan's testimony is in the record and that may be responsive to that first thing on his notes..

THE COURT: "Was he offered $1500 and did he know this?"

Incredible. Put that down.

Well, bring the jury in and I will deal with these things one by one.

(In open court.)

(Jury returned to the courtroom at 3:55 p.m.)

THE COURT: I have your note, ladies and gentlemen. I understand some of it. I don't understand much of it.

I will deal with this as far as I understand those parts of it that are comprehensible to me.

First of all, the first part of the note, the "Questions which we would like asked" which is separated from the evidence wanted, let me tell you now that the case is over, whatever questions are to be asked have been asked. There are no more witnesses and you will decide this case on the evidence you have heard and received. So there will be no questions asked at this stage of the proceeding of anyone.

Let us get to the evidence wanted.

"The tape and written transcripts," 3517 and 3518.

You certainly may have the written transcripts and should you want the tapes played, they will be played for you in open court. Is that clear?

"Transcript of Bannigan's interrogation with his notations."

Does that mean that you want Mr. Bannigan's testimony read?

THE FOREMAN: That means after the defendant was arrested, when he first interviewed him, we would like that.

THE COURT: That document is not in evidence and is therefore not available to you. It was not offered in evidence and was not received in evidence.

THE FOREMAN: All right.

THE COURT: "Transcript of the marks at college."

That was received in evidence and you may have that.

"Court notes relevant to how long has defendant been unemployed."

It is my recollection and that of counsel, but we will cause the minutes to be searched in the meanwhile, it is my recollection and that of counsel that the record does not disclose the duration of his unemployment, but we will cause the record to be checked about that.

"Was he offered $1500 and did he know this?"

Those are part of the questions you are here to decide.

Now, that leaves open the question of do you want to hear the tapes played in addition to having the written transcripts?

THE FOREMAN: Yes.

THE COURT: Is that the view of the jury?

THE FOREMAN: Yes.

THE COURT: Play the tapes. Wait until the transcripts are distributed.

(Tape played.)

THE COURT: As I told you, ladies and gentlemen, that particular tape relates to count 1, not to count 2.

The one you are about to hear you may consider with respect to both counts 1 and 2.

(Tape played.)

THE COURT: Ladies and gentlemen, you may retire and take these transcripts into the juryroom if you wish.

Now, let me ask the reporter if you have during the playing of the tape looked to see whether there are any references to how long the defendant has been unemployed, is that correct?

(Testimony read as requested.)

THE COURT Now, does that substantially meet your questions?

THE FOREMAN: We would like the Court notes relating to the Bannigan testimony.

THE COURT: You want the entire testimony read?

THE FOREMAN: Yes, we would.

THE COURT: Read that, Mr.Reporter.

(Testimony of witness Bannigan read.)

THE COURT: Is there anything else you want, ladies and gentlemen? You have the school transcript?

THE FOREMAN: Yes.

THE COURT: You may retire.

(At 5:35 p.m. the jury left the courtroom.)

THE COURT: I plan on keeping the jury about an-

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other hour and then let them go home and come back tomorrow morning if they haven't agreed by that time.

(At 6:35 p.m. the jury returned to the courtroom.)

THE COURT: Have you agreed upom a verdict?

THE FOREMAN: No, we haven't.

THE COURT: Now, I will ask you to come back tomorrow morning at 9:30 and you are to be here promptly and report directly to the juryroom at that time.

You are excused.

(The jury left the courtroom.)

THE COURT: All right. 9:30 tomorrow.

(Adjourned to February 1, 1974, at 9:30 o'clock a.m.)

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UNITED STATES OF AMERICA
v.
KAN LANG NG and VIRACHAI SANGUANDIKUL

New York, February 1, 1974;
9:30 o'clock a.m.

Trial resumed.

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THE COURT: With regard to the case on trial, at 10 o'clock I will bring the jury in for my modified version of the Allen charge so be here.

MR. GOLUB: Your Honor, if I may on the record, I believe yesterday after leaving the jury asked as to my status here as counsel and whether I was Legal Aid or not. I don't think that question was answered to the jury.

THE COURT: No, and I don't think it matters at all.

MR. GOLUB: Well, I would except to your Honor's decision.

THE COURT: Yes. Just because we have time and for my general amusement, I would invite you to tell me how that bears on the innocence or guilt of the defendant, the fact that you are assigned rather than

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retained.

MR. GOLUB: I think it bears directly. There is obviously a question in the jury's mind that was raised whether this defendant ever received any money and if so how much or whether he had been involved in any heroin sales and certainly whether he could obtain private counsel would reflect on that question, and I think that is why the jury asked.

THE COURT: You think that if he just got counsel assigned that that would indicate somehow he hadn't been paid illicit money from heroin?

MR. GOLUB: I think it is a question of relevancy for the jury and I respectfully request it.

THE COURT: This has ceased to amuse me.

(The following took place in the robing room.)

THE COURT: My clerk tells me last night coming down in the elevator juror No. 2 indicated if he could ask him a question and the clerk indicated he could not, and Juror No. 2 said he wanted to discuss it and he would write me a note this morning. I just received the following note:

"Your Honor, I request your permission to be excused from the jury on the ground any action would be of a prejudice to the defendant. Also

on the ground that my present view of the case is of bias feeling and extreme doubt. I hope your Honor will grant me this wish."

It is signed Juror No. 2.

Juror No. 2, I think that is the best way of describing him, since I don't know his name, is the person who appears to be Asian, Mr. Lai, or something.

Well, I really feel I have no intention of excusing Mr. Lai at this point unless you both indicate that you want him excused and will consent to proceed with a jury of eleven. Other than that we will continue.

MR. MURPHY: I don't object to eleven.

MR. GOLUB: At this time I would like to move for a mistrial.

THE COURT: Denied.

MR. GOLUB: I will consent to the removal of the juror.

THE COURT: Do I understand that you consent to continue the deliberations with eleven? Now that I denied your motion for a mistrial?

MR. GOLUB: He had a conversation with your court clerk?

THE COURT: On the way out.

THE CLERK: Yes, your Honor.

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MR. GOLUB: Last night.

THE COURT: As the juror was leaving the court the clerk was leaving.

MR. GOLUB: Mr. Murphy wasn't present nor I yesterday when the jury walked out. Was Mr. Lai present?

MR. MURPHY: I think he was. It makes no difference to you.

MR. GOLUB: I have absolutely no opinion on it, your Honor.

THE COURT: I invite you to comment if you wish. Will you agree that he be excused and that the jury continue?

MR. GOLUB: May I see the note?

THE COURT: You may see it.

MR. GOLUB: Thank you.

(Handed to counsel.)

THE COURT: That will be marked as a court exhibit.

xx (Note marked as Court Exhibit 2.)

MR. GOLUB: In light of the fact that you denied my motion for a mistrial, I will consent at this time that Juror No. 2 be excused and that the deliberations continue without Juror No. 2 being present.

THE COURT: All right. Would you explain that to

your client, please, because I want him to consent to this on the record.

(Pause.)

MR. GOLUB: My client asks to know whether or not the other jurors in the juryroom saw the note.

THE COURT: I would think not. I don't know. I am certain they would not but I have no knowledge. That isn't the way notes are sent. They are not generally circulatedamong the people.

(Pause.)

(Defendant and interpreter present in robing room.)

THE COURT: Mr. Sanguandikul, has your lawyer told you that Juror No. 2 wishes to be excused from further service in this case?

THE DEFENDANT: (Through the interpreter) Yes.

THE COURT: Do you understand that you are entitled to have your case considered and decided by a jury of twelve?

THE DEFENDANT: Yes, sir.

THE COURT: Have you consulted with your lawyer and do you now agree that the case may continue and that a jury of eleven may decide your case if I excuse Juror No. 2?

THE DEFENDANT: That is okay.

THE COURT: Do you now consent then that I excuse Juror No. 2?

THE DEFENDANT: That is correct.

THE COURT: All right.

Bring the jury in, please.

(In open court, jury present, at 10:10 a.m.)

THE COURT: Good morning, ladies and gentlemen.

Mr. Lai, both sides have consented that you may be excused from further service on this jury and the jury will continue its deliberations with eleven people on the jury. You are excused and you may leave the box now.

(Juror No. 2 excused.)

THE COURT: As I have said, ladies and gentlemen, that was consented to by both sides at the request of Mr. Lai.

As stated in the instructions given at the time the case was submitted to you for decision, you should not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors or for the mere purpose of returning a verdict.

However, it is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement if you can do so without violence to your individual judgment.

Each of you must decide the case for yourself, but you should do so only after a consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced it is erroneous.

In order to bring your minds to a unanimous result, you must examine the questions submitted to you with candor and frankness, and with a proper deference to and regard for the opinions of others. You are not partisans, you are judges, as I told you before, judges of the facts.

Your sole interest here is to seek the truth from the evidence in the case. You are the exclusive judges of the credibility of all of the witnesses and of the weight and effect of all of the evidence.

In the performance of this high duty, you are at liberty to disregard all comments of both counsel and Court including the words and remarks I am now making. Remember at all times that no juror is expected to yield a conscientious conviction either he or she may have as to the weight or effect of the evidence.

But remember also that after full deliberation and consideration of all the evidence in the case, it is

your duty to agree upon a verdict if you can do so without violence to your individual judgment and conscience.

You may conduct your deliberations as you choose but I suggest that you now carefully re-examine and reconsider all of the evidence in the case bearing upon the questions before you. You may be as leisurely in your deliberations as the case may require and you shall take all the time which you feel is necessary.

You may now retire and continue your deliberations in such manner as shall be determined by your good conscience and judgment as reasonable men and women. You may retire.

(At 10:20 a.m. the jury left the courtroom.)

MR. GOLUB: I note my exception on the record.

THE COURT: All right, Mr.Golub.

(The following took place in the robing room.)

THE COURT: I received the following note:

"Your Honor, we would like to hear part of the tape 3518 again. First three pages and the top of page 4 up to the point where the defendant leaves Bario's car. We would like to hear page 3 to the top paragraph of page 4 where the defendant leaves the car twice. We want to hear page 3 up to where he leaves the car twice."

I will give that to you so that the people who run the tape can take care of that.

"Could the speaker be brought closer to us and the volume lowered?"

All right, get that organized and when it is ready bring in the jury.

(Jury note marked as Court Exhibit 3.)

MR. GOLUB: Again, in the light of all this difficulty over the tape, I am again going to request that there be a mistrial.

THE COURT: Yes, denied.

(At 11:10 a.m. the jury returned to the courtroom.)

THE COURT: I have your note and we are about to comply with your request, and please indicate to us if it is too loud or too soft, please.

(Tape played.)

THE COURT: Have we reached the point where you want to hear?

THE FOREMAN: Yes.

THE COURT: Start on the top of page 3 and play to where the defendant leaves the car on the top of page 4. Through the chairman of the jury, would you like that played a second time at a somewhat reduced rate of speed?

JUROR NO. 8: Yes, that would be a good idea.

THE COURT: Slow it down somewhat.

(Tape played.)

MR. GOLUB: That is the same part that we played before and --

THE COURT: The jury asked for the part at the top of page 3 and ending where the defendant supposedlyleaves the car to be played twice and that is what we are now playing, that section, for the second time.

MR. GOLUB: Now it is being played slower.

THE COURT: I asked the jury and they thought it would be helpful.

JUROR NO. 8: A little bit louder.

MR. MURPHY: As a point of information, we can play it very slowly, very fast, play it again and again and really we can play the tape in any way that the jury wishes, and if you will so instruct it we will play it as you wish.

THE COURT: Mr. Murphy, while I am presiding at the trial I think that perhaps I will be the interrogator as to what their preferences are.

MR. MURPHY: Excuse me, your Honor.

THE FOREMAN: Your Honor, some of us would like to see a part of page 2 again, too.

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THE COURT: Start at the top of page 2 and you have your exception and the government has its exception and everybody has an exception.

All right, start with page 2 and play it at a somewhat slower speed.

(Tape played.)

THE COURT: Now, you wanted to hear the end of the tape starting with the point of the arrest and to the end of the tape, I gather. Is that correct?

THE FOREMAN: Yes. But we would like that portion once more at the normal speed again.

THE COURT: All right, start at page 2.

THE FOREMAN: Yes.

THE COURT: Start at page 2 and play it at the normal speed.

(Tape played.)

THE COURT: Take it to the end of the tape at the time of the arrest.

(Tape played.)

THE COURT: I believe that complies with your request, ladies and gentlemen. You may retire.

(At 11:35 a.m. the jury left the courtroom.)

THE COURT: Could you arrange to have the luncheon orders taken, please, and have it brought in?

I am not sending them out today. We better take it now because it takes long to get here.

MR. GOLUB: If your Honor please, I would again--

THE COURT: It isn't necessary again and again to except to the same thing.

MR. GOLUB: I think even as the tape was being played at a slow speed the speed was changed during the time the tape was being played.

THE COURT: Because I thought it was being played at too slow a speed so I asked them to advance the speed a little and he complied with my suggestion to the point at which I wanted it complied with. Your exception and exceptions to come and exceptions in the past are all duly noted in the record with respect to the playing of the tape.

MR. GOLUB: Thank you.

THE COURT: We will adjourn for lunch from one until two o'clock.

(At 12:02 p.m. the jury returned to the courtroom.)

THE CLERK: Please answer to your names as they are called.

(All jurors present.)

THE CLERK: Madam Forelady, have you agreed upon a verdict?

THE FORELADY: We have.

THE CLERK: How do you say as to count 1, guilty or not guilty?

THE FORELADY: Guilty.

THE CLERK: How do you say as to count 2?

THE FORELADY: Guilty.

THE CLERK: Thank you.

THE COURT: Ladies and gentlemen of the jury, it is not my practice generally to comment on the verdict of a jury but I feel compelled to deviate in this situation today. I want to tell you that as a lawyer of some 37 yearsat the bar it has been my view that any other verdict in this case would have been unthinkable.

I appreciate the careand consideration that is perfectly obvious on the record that each and every one of you gave to these facts. Your repeated asking for the playing of the tapes and your request for evidence all indicate beyond any question that you have acted in accordance with the best traditions of American justice.

I appreciate your consideration of the difficult task you have performed and you are discharged with the thanks of the Court.

(The jury left the courtroom.)

THE COURT: I will fix March 17th for sentence.

MR. GOLUB: May I have until then for all motions, until the time of sentence?

THE COURT: Yes. A presentence report is added. I suppose the question of bail is academic, but the defendant is remanded.

Is there anything else this morning?

MR. MURPHY: I think not, your Honor.

THE COURT: Thank you, gentlemen.

UNITED STATES OF AMERICA

vs.

VIRACHAI SANGUANDIKUL

Before: Hon. Arnold Bauman, D. J.

New York, N. Y., April 8, 1974, 10:50 a.m.

For the Government: Daniel H. Murphy, II, Esq., AUSA.

For the Defendant: William K. Madden, Esq.

THE COURT: Swear the interpreter.

(Ms. Amphorn Tansomboon was sworn as the Interpreter by the Clerk of Court.)

THE CLERK: State your name.

THE INTERPRETER: Amphorn Tansomboon.

THE COURT: Does the government wish to be heard?

MR. MURPHY: No, your Honor.

THE COURT: Yes, Mr. Madden.

MR. MADDEN: I am not certain whether this interpreter can interpret simultaneously.

THE COURT: Can you interpret simultaneously?

THE INTERPRETER: I will try my best.

THE COURT: If you have any difficulty, let me know.

MR. MADDEN: Judge, as a matter of law, I move

that after the conviction of the defendant, that there be entered a directed verdict or in the alternative, a mistrial be declared.

There is no writing required by law indicating the defendant's knowledgable waiver of constitutional right to a 12-man jury trial.

The Second Circuit says in the case of United States against Hayutin 398F2d.944, that Rule 23B providing for a jury of 12 unless a lesser number is stipulated to in writing by the parties is mandatory. This rule was again cited by the Ninth Circuit in United States against Guerrero 446F 2d.876, the Court enunciated Rule 23B as a mandatory requirement, citing the Second Circuit case.

As a matter of fact, I respectfully request a directed verdict of an acquittal be entered or in the alternative, a mistrial be granted.

THE COURT: Mr. Madden, in the case of United States against Vega, 47F2d.698 cited in the government's brief, you have a case indeed where conviction was affirmed under facts not quite as strong as are presented here.

In this case at the time the note was received from the jury, I believe the record will disclose, and I am speaking from memory now, that I notified counsel, trial counsel of his right to a jury by 12 and asked him what

his wishes with respect to proceeding, having eliminated I believe, Juror No. 2. After consideration, he indicated that he wished to proceed with a jury of 11 and offered so to stipulate.

I told him that I wanted him to think it over, again speaking from recollection, but more importantly, that I wanted him to consult with the defendant in such length as he saw fit, and that I would require from the defendant a statement that he consented to proceed with the jury of 11 if that was the defendant's wish.

It is my recollection, trial counsel then went out and did consult with his client and announced that his client wished to proceed with a jury of 11.

I interrogated the defendant on the record through his interpreter, and I want to say something in a minute about his ability to understanding English.

The defendant then indicated it was his wish to proceed without Juror No. 2. That was done. The case concluded with a verdict which was in accordance with the overwhelming weight of the evidence against him.

In United States versus Vega to which I just referred, it does not appear from the opinion that the defendant in that case, as opposed to this one, ever was personally interrogated, or ever personally gave his

consent. Such consent as was given there was relayed by counsel and apparently the precise words of the defendant do not appear in that record.

Therefore, under the law of this Circuit in United States against Vega, your motion is denied.

I want to make clear my view, having observed this man throughout the trial of his ability to speak English -- did you want to say something, Mr. Madden?

MR. MADDEN: I wanted to interrupt the Court, but I will wait.

THE COURT: From the first, it has been clear to me -- you translate this word for word.

From the first it has been clear to me that this man has been trying to perpetrate a hoax on the Court in connection with his allegations that he does not speak English, speak or understand English.

The case was preceded by a hearing. During the course of that hearing, before the defendant took the stand, he indicated by head gestures his disagreement with the testimony in English of the witness or witnesses who was then testifying. When he took the stand at that hearing his entire interrogation was conducted in English and he answered every question indicating a keen understanding of what was going on.

For some reason of which I am unaware, the female interpreter then said that he did not -- interrupted the proceedings to say that he did not understand. What the reason was for that unsolicited remark I don't know, but she was visibly agitated and visibly distressed, because it is clear to me that she understood that when he spoke English, he was destroying the underpinnings of his claim.

I ordered her replaced. Her personal interest is indicated by the fact that throughout most of the following day, she was present and an interested spectator in the trial of this man. Her statement was volunteered, untruthful and borne of emotion and I disregard it.

Now, during the course of the trial, tape recordings were introduced of conversations in which this defendant participated.

It is clear to me during the course of this narcotics transaction in which he was engaged, and during the conversations in the car, he knew precisely what was going on and participated in the conversations.

Speaking of those tapes, as the jury was listening to them, the jury was furnished with a transcript. I observed the defendant during the playing of those tapes, and he read and followed, Mr. Madden, every word that was

said.

There was further introduced into evidence at the trial his college record. His college record indicated attendance at a wide variety of subjects, including mathematics, and indicated, in the overwhelming majority of the courses which appear on that record which is an exhibit in the case, his passing of this wide variety of subjects taught in English, indicated to me that his knowledge of the language was sufficiently broad for him to understand anything and everything that went on in this courtroom.

He then took the stand and told a story that in my experience is hoary with age. The story I first heard in 1938 as an Assistant District Attorney of New York County of the fellow who is asked to deliver a package, the contents of which he does not know. It may not be the sweetest story ever told, but it is by sure the oldest story ever told in this kind of case.

There is not the slightest doubt in my mind that he understood what he was doing when he was making this deal for three pounds of pure heroin, 98 percent pure, Mr. Madden; that he understood it then, that he understood the proceedings that ensued at every stage, and that as he sits here now, he knows exactly what I am saying,

interpreted or not interpreted.

During the hearing he indicated that he thought his interrogator upon his arrest in the United States Attorney's Office might be his lawyer. When he got to the trial, however, a few days later, he didn't testify to that because then he would have to admit that he made the statements that the United States Attorney said he made, but the instances of lying are numerous and I feel the record should be complete with respect to his understanding of the English language, as I believe it now to be.

I will ask the United States Attorney to say anything he wishes to if he differs with the Court in any of the things I have said.

MR. MURPHY: No, your Honor. I think the Court's statement of the facts was substantially correct, as I recall. The percentage of heroin was 95 percent, not 97 percent.

THE COURT: I beg your pardon.

I was talking about his comprehension of English, really.

MR. MURPHY: No.

THE COURT: Now, Mr. Madden, I will hear you with respect to the sentence.

MR. MADDEN: May I address the Court with respect

to the motion placing aside any question or any issue as to the defendant's understanding of the English language.

THE COURT: Yes.

MR. MADDEN: Placing that issue aside, I still believe there was no proper waiver of a 12-man jury. I believe that the defendant's trial counsel, too quickly agreed to waive the defendant's constitutional right to a 12-man jury. A waiver of constitutional rights cannot be made lightly. Right in my judgment can be waived, but there must be a thorough investigation and there must be a thorough understanding on the part of the defendant of the results of a waiver of constitutional right.

I refer the Court to page 28 of the trial transcript. The defense counsel at that time prior to consulting with the defendant agreed to waive the defendant's right to a verdict by 12 men.

THE COURT: Because he then thought, Mr. Madden, it was in the defendant's interest.

MR. MADDEN: Be that as it may, your Honor --

THE COURT: No, you can't flub that off that quickly. Go ahead.

MR. MADDEN: My point is, you had an obligation and duty to consult the defendant prior to his so eagerly entering into such a waiver on the defendant's behalf.

THE COURT: First of all, it wasn't eager as I remember what happened in the robing room. All three of us looked at the note from the juror, puzzled over it and tried to see what conclusions we might draw from it. Nobody raced into anything.

MR. MADDEN: I believe that the defense counsel, perhaps he didn't race into an agreed waiver of a verdict by 12 men but he was too eager upon instruction of the Court, after agreeing to waive the jury by 12 men, he went back and consulted with the defendant informing him, I believe, that he had a right to a 12-man jury. Defense counsel then came back and informed the Court that defendant waived his right to a 12-man jury and the Court then undertook on its own to interrogate the defendant as to his waiver.

My point is, defense counsel when he went to the defendant and spoke to the defendant , I believe already was predisposed to waive the 12-man jury and that he perhaps did not fully inform the defendant of his constitutional rights of having a verdict rendered by 12 men.

THE COURT: I did, I told him that. I haven't seen the transcript but I have the clearest recollection of having said to this man, "You have the right to have this case determined by a jury of 12."

Did I not say that?

MR. MADDEN: Yes, you did, your Honor. It is in the transcript.

In my discussion with the defendant, it is the defendant's understanding of the American legal system that if a verdict is rendered by a majority, in other words, if an eight to four verdict is rendered for acquittal, that there is no such thing as a hung jury but that the defendant is indeed not guilty. That is the defendant's understanding of the American legal system.

THE COURT: I don't see how he could have understood that because in my charge I said the verdict must be unanimous and I have no doubt that he knows precisely what that means.

Just a moment, Mr. Madden.

Curiously by the way, talking about consultation, after I asked Mr. Golub to consult with his client, Mr. Golub says "My client asks to know whether or not the other jurors in the jury room saw the note."

Does that show a lack of comprehension as to what was going on in the courtroom?

MR. MADDEN: If I can interrupt the Court, not if it came from the defendant, but that statement may have originated with the lawyer.

THE COURT: "My client asks to know."

I said to him "Do you know you are entitled to have your case decided by a jury of 12"? And the defendant answered "yes."

"Have you consulted with your lawyer and do you now agree that the case may continue and that a jury of 11 may decide your case if I excuse Juror No. 2"?

"The defendant: That is okay."

"The Court: Do you now consent then that I excuse Juror No. 2"?

"The defendant: That is correct."

Motion is denied. I will hear you with respect to the sentence.

MR. MADDEN: Your Honor, the interpreter informs me she was unable to translate simultaneously to the defendant, that many of the words that were spoken she was unable to translate into the Thai language.

If necessary, I would like her to go on the record and state such and we will continue with the proceeding. She claims she is having difficulty in translating to the defendant.

THE COURT: I will tell you what we are going to do, Mr. Madden.

I am going to recess this sentence until 9:30

tomorrow morning. I am going to ask the reporter to read every word to the interpreter and she will translate it word for word to this man who doesn't need translation anymore than you do.

A recess was taken to be resumed April 9, 1974 at 9:30 a.m.

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 28 day of June, 19 74 at No. E Appellant deponent served the within Appellant Appendix upon the U.S. Attorney Foley Square herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the appellee therein.

Sworn to before me,
this 28 day of June 19 74

Edward Bailey

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1975